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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Lisa Council Gonzalez

Serial No. 78363598

John Wiley Horton of Pennington, Moore, Wilkinson, Bell & Dunbar, P.A. for Lisa Council Gonzalez.

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Before Hairston, Walters and Zervas, Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Lisa Council Gonzalez has appealed from the final refusal of the trademark examining attorney to register LAMMY JAMMYS (standard character drawing) as a trademark for the following goods, as amended; "clothing, namely sleepwear, t-shirts and associated items, namely pajamas,

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socks, and underwear."¹ Applicant has entered a disclaimer of the term JAMMIES (not JAMMYS).

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark LAMIE, previously registered for "children's wear, namely, pants, shirts, t-shirts, coats, jackets, shorts, tops, pajamas, underwear, socks, sweatshirts, sweatpants, jeans, dresses, overalls, bathing suits, tank tops, sleepwear,"² that, as used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed. Applicant did not request an oral hearing.

We affirm the refusal of registration.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis,

¹ Application Serial No. 78363598, filed February 6, 2004, asserting a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 2786019, issued November 25, 2003.

two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We initially turn to the second, third and fourth *du Pont* factors, i.e., the similarity or dissimilarity of registrant's and applicant's goods, the relevant trade channels and the purchasers of such goods.

Applicant's goods, which include children's sleepwear, t-shirts, pajamas, socks and underwear, are specifically included in registrant's identification of goods. The goods are, in part, identical, or are otherwise closely related clothing items. Thus, the second *du Pont* factor weighs in favor of a finding of likelihood of confusion.

With respect to the trade channels and purchasers of the respective goods, we note that the identifications of goods in the application and the cited registration do not contain any restriction as to trade channels. We presume, therefore, that applicant's and registrant's goods are marketed in the same, overlapping trade channels to the same classes of purchasers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, the third and fourth *du Pont* factors

also weigh in favor of a finding of likelihood of confusion.

We next consider the similarities and dissimilarities of the marks. Specifically, we must determine whether applicant's mark LAMMY JAMMYS, and registrant's mark LAMIE, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. We do not consider whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Turning first to consider applicant's mark, we note the following dictionary definition of the term "jammies," which is of record: "*Informal. Pajamas.*"³ We find that the term JAMMYS in the context of applicant's goods is a slight misspelling of "jammies," and is likely to be pronounced

³ The examining attorney, who introduced the dictionary definition into the record in connection with her requirement that JAMMIES be disclaimed, did not indicate the source of the definition of "jammies." Applicant has not contested the definition of "jammies" offered by the examining attorney.

the same as "jammies." As such, we find that consumers would perceive the term JAMMYS as a highly descriptive or generic term in relation to sleepwear.

Because of the descriptive nature of JAMMYS, and because LAMMY is the first term in applicant's mark, i.e., the term purchasers will first encounter when perceiving applicant's mark, we find that LAMMY is the dominant element in applicant's mark.

Applicant argues that "the proper pronunciation of LAMIE is somewhat ambiguous from the way the term is spelled [and] most consumers would pronounce LAMIE with a hard 'A,' and the first syllable of the term would be pronounced 'lay.'" There is no correct pronunciation of a trademark because it is impossible to predict how the public will pronounce a mark. See *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985). Thus, the "A" in registrant's mark could just as well be pronounced the same as the "A" in "lamb." We are therefore not persuaded by applicant's argument and find that the dominant portion of applicant's mark, LAMMY, is likely to be pronounced the same as registrant's mark, LAMIE, regardless of whether the "A" is hard or soft.

When considering the mark as a whole, applicant argues that LAMMY JAMMYS "is lyrical in structure in that [the]

word JAMMYS resounds the AMMY ending of LAMMY. The mark LAMMY JAMMYS therefore creates a jovial impression in the mind of consumers regarding the source of the goods as the consumer pronounces the mark in a sing-song manner."

(Brief at unnumbered p. 3.) While applicant's mark does have a lyrical, rhyming, quality to it, we do not ignore that JAMMYS is likely to be pronounced the same as the highly descriptive or generic term "jammies" and that JAMMYS has less trademark significance than LAMMY. Applicant's argument regarding the lyrical quality of the mark does not overcome the fact that LAMMY is likely to be perceived as the dominant portion of applicant's mark.

Next, we consider the appearance of the marks. When the marks are taken as a whole, it is apparent that there are differences - applicant's mark is two words in length while registrant's mark is only one word, and LAMIE and LAMMY have different endings.

With respect to the meaning of LAMIE and the LAMMY portion of applicant's mark, applicant has not argued in her briefs that these terms have any meaning and the record in this appeal is devoid of any evidence that LAMIE or LAMMY have any meaning. We therefore conclude that registrant's mark and the LAMMY portion of applicant's mark are arbitrary terms.

In summary, while the marks differ in appearance and neither LAMIE nor LAMMY have any identifiable meaning, LAMMY, the dominant term in applicant's mark may be pronounced the same as registrant's mark. The addition of JAMMYS - a slight misspelling of a highly descriptive or generic term, "jammies" - to LAMMY does not result in a mark that, considered in its entirety, creates a sufficiently separate commercial impression from the registered mark.

Upon consideration of the foregoing, we conclude that the commercial impressions of the marks are highly similar. See *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999). The first *du Pont* factor is hence resolved in favor of a finding of likelihood of confusion.

In cases such as this case, where the applicant's goods are identical in part to the registrant's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). In view thereof, and because each of the *du Pont* factors considered above weighs

in favor of a finding of likelihood of confusion, we conclude that confusion with registrant's mark is likely to occur if applicant's LAMMY JAMMYS mark were to be used on or in connection with the goods identified in applicant's application.⁴

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.

⁴ To the extent that there is any doubt on the issue of likelihood of confusion, such doubt must be resolved in favor of the prior registrant. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).